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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. _____

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit denying the petition herein to review and modify a judgment of the United States Circuit Court of Appeals for the Second Circuit. A transcript of the record of the case is furnished herewith in accordance with Rule 38 of this Court including the subsequent proceedings in the United States Court of Appeals appended hereto consisting of the respondent's motion to dismiss and the opinion of the Court of Appeals.

Jurisdiction

The statute under which jurisdiction is invoked is Title 28, United States Code, Section 1254, formerly Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

Summary Statement of the Matter Involved

The decision of the United States Court of Appeals which this Court is asked to review is in a proceeding in equity based upon a petition and affidavit filed pursuant to the authority of the decision of this court in *Hazel-Atlas Glass Company* v. *Hartford-Empire Company,* 322 U. S. 238. The petition requested the Court of Appeals to review and vacate its judgment entered April 22, 1935, affirming a deficiency assessment for personal income tax against the petitioner for the year 1929 in the sum of $51,353.70 and to alter and modify said deficiency judgment to the sum of $5,319.89. The opinion of the Court of Appeals (then the Circuit Court of Appeals for the Second Circuit) in the original case affirming the deficiency assessment in April, 1935, is reported in *Taylor* v. *Commissioner,* 76 Fed. 2d 904.

In the proceeding to modify the deficiency judgment *all* the allegations of the petition are admitted and the requested writ does not involve any factual review. The respondent's defense, so far as it forms the basis for the decision of the Court of Appeals and so far as this application for the writ is concerned, is that a similar petition was denied by the same Court *and that the new facts presented for the first time* by the petitioner do not justify the granting of relief under the authority of Hazel-Atlas (supra). The factual background disclosed by the record and conceded by the respondent follows:

The Commissioner of Internal Revenue disallowed for the petitioner's income tax for the year 1929 a *capital* gain of $490,006.67 realized from the sale of 14,000 shares of Public Service Corporation of New Jersey held by the petitioner for more than two years prior to sale upon which a tax was paid at the rate of 12½%. The *exclusive* ground stated in the deficiency letter by the Commissioner for this disallowance was that the petitioner was held to be a stock-trader *based upon the large dollar volume of the secur-*

ities sold (Paragraph "Third" of petition, p. 2). The Commissioner, therefore, treated the capital gain reported as ordinary income taxable at higher rates which resulted in the deficiency tax of $51,353.70.

From the above determination the petitioner appealed to the Tax Board. The Tax Board found that Public Service shares held for more than two years had been sold and that a gain had been realized therefrom but held that it was not a *capital* gain because the Board sustained the Commissioner's determination that the petitioner was a stock-trader based upon the volume of the stock sales (Pars. "Third" and "Eleventh" of petition, pp. 3, 4 and 7).

On appeal from the Tax Board the Circuit Court of Appeals rejected the stock-trader theory and held that the petitioner as "a busy lawyer" was entitled to the limitation in tax on profits realized from the sale of securities held for more than two years prior to sale (Opinion *Taylor* v. *Commissioner,* 76 Fed. 2d, 904). The Circuit Court of Appeals held, however, with respect to a question raised for the first time at the Tax Board hearing concerning the length of time the 14,000 shares had been held prior to sale, that because of lack of evidence of the sales of other Public Service shares (not available at the hearing because no pertinent or affirmative issue with respect hereto had been raised by the Commissioner in the deficiency determination or answer) that it was unable to determine with certainty whether the particular 14,000 shares from the sale of which the capital gain had been realized had been held for more than two years prior to sale. The Circuit Court of Appeals commented, however, that it was *"unlikely"* that such was not the case since it appeared that more than 14,000 shares had been held for more than two years prior to sale, that there had been no prior or interim sales and all the shares had been sold in October-November, 1929. The Court commented that this aspect had been *"left in the air"* and that the decision was *"unsatisfactory"* (Opinion, *Taylor* v. *Commissioner,* 76 Fed. 2d, 904; paragraph "Fourth" of petition, p. 4; pp. 15, 16, affidavit attached to petition).

The petitioner, feeling aggrieved, applied to the appropriate departments of the Government for remedial relief with the result that the Department of Justice on January 19, 1939, addressed a memorandum opinion to the Treasury Department stating that both the Tax Board and the Circuit Court had been led by the *"erroneous insistence of representatives of the Government"* into making and sustaining a *"fundamental erroneous deficiency determination"* and that:

> *"We find that the petitioner in good conscience to be entitled to relief;"*

and that the case was one

> *"in which relief ought to be afforded"* (Pars. "Fifth", "Eighth" and "Twelfth" of petition, pp. 4, 5, 6, 7).

Thereafter the petitioner located the records of all the Public Service transactions and submitted them to the Treasury Department which, as a result of recomputation and giving effect to the capital gain limitation in tax authorized by the decision of the Court of Appeals, *made a determination dated October 17, 1944, that the correct deficiency in tax for the year 1929 was $5,319.89* (pars. "Sixth" and "Thirteenth" of petition, pp. 5, 7; p. 16, affidavit attached to petition).

The foregoing facts with reference to the opinion of the Department of Justice and the determination by the Treasury Department of the correct deficiency were *not known to the petitioner in 1944 when he presented the former petition for a review of the deficiency judgment and for a rehearing* (Par. "Eighth" of Petition, pp. 5, 6). Such facts did not become known to the petitioner until several years later when, having paid the erroneous deficiency in full, with interest ($108,842.12), he instituted an action for refund in the District Court for the Eastern District of New York (Par. "Tenth" of Petition, pp. 6, 7).

The answer of the defendant-collector in the refund action admitted the facts stated above, but pleaded as a

bar to a refund, based upon the doctrine of res judicata, the unmodified deficiency judgment of the Circuit Court. The District Court stated there was no longer any factual dispute but accepted the defense of res judicata and dismissed the refund action (Opinion, Kennedy, J., p. 11 of Petition). From this decision the petitioner has appealed. This appeal is pending but if the District Court is correct the petitioner will not be able to obtain a refund so long as the deficiency judgment remains unmodified (Pars. "Tenth", "Fourteenth" and "Fifteenth" of Petition, pp. 6, 7, 8).

Accordingly the petitioner filed the new petition to the Court of Appeals submitting *for the first time* the facts with reference to the opinion of the Department of Justice and the determination by the Treasury Department of the correct deficiency and requesting the Court to modify the deficiency so that it would be in accordance with the determination of the Treasury Department. In denying the petition the Court of Appeals stated in its opinion that the only new facts presented were the opinion of the Department of Justice and the determination by the Treasury Department of the deficiency which were held as affording *"no basis whatever"* to modify its former judgment. *The Court of Appeals suggested, however, that the petitioner could apply for an Act of Congress for relief* (Opinion, Court of Appeals, appended hereto).

As the matter stands the Treasury Department of the United States, through what the Department of Justice has characterized the "erroneous" action of representatives of the Government, has collected from the petitioner and retains an amount of (tax) moneys, with interest, approximately ten times the concededly correct amount—an unjust enrichment which the Treasury Department asserts it is entitled to retain because of the unmodified deficiency judgment as to which it is also asserted the Court of Appeals lacks authority to modify.

Questions Presented

(1) Do not the factual findings and determinations of departments of the government rendered in the routine discharge of public duties constitute a true basis for an original proceeding in equity to vacate and modify erroneous judgments?

(2) Is not the unchallenged and conceded determination of the Treasury Department of the United States correcting a tax deficiency in favor of the taxpayer conclusive upon the United States Court of Appeals in a proceeding in equity to modify an admittedly erroneous deficiency tax judgment?

(3) Is the exercise of the equity powers of the United States Court of Appeals to vacate and modify its judgments limited to cases where fraud has caused the error, or should not such authority likewise be exercised where the fundamental error is conceded by the respondent party?

(4) Where a judgment involves a concededly fundamental error which is "sufficiently gross" and "manifestly unconscionable" is it not *the duty* of the Court of Appeals to correct the same by modifying its judgment in accordance with the conceded facts?

Reasons Relied on for Allowance of Writ

The questions above presented are of public importance and involve issues of general law in the relations of the citizen and his Government in conjunction with principles of fundamental justice in the correction of egregious error in the collection of taxes. Specifically, the decision of the Court of Appeals involving the questions presented is in conflict with the applicable decisions of this Court in the case of Hazel-Atlas and similar decisions respecting the exercise of equity powers to set aside and alter judgments

concededly and grossly erroneous and manifestly unconscionable. The decision of the Court of Appeals is also in conflict with applicable decisions of this Court establishing fundamental rules with respect to the conclusiveness of unquestioned factual findings of Government Departments,—and specifically with respect to a factual determination of the Treasury Department made in the interest of just and fair administration of Federal taxation.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court.

May, 1952.

WINTHROP TAYLOR,
Petitioner,

By JACKSON A. DYKMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Delivered in Courts Below.

Taylor v. *Commissioner*, 76 Fed. 2d 904;
Taylor v. *Commissioner*, Decision and Opinion of Court of Appeals dated March 18, 1952, appended herewith.

Jurisdiction

Statute under which jurisdiction is invoked is Section 347 Title 28, United States Code, Section 1254, formerly (Judicial Code, 28 U. S. C. Section 240, Amended (a)).

In accordance with Rule 38 of this Court it is believed that jurisdiction is sustained because of conflicts with decisions of this Court involving questions of general law of public importance in the interest of just and fair Federal tax administration and also as concerns the duty generally of Federal courts to remedy fundamental errors involved in their judgments.

Cases which enunciate the principle of granting writs where questions of public importance are involved are:

Magnum Import Company v. *De Spoturno Coty*, 262 U. S. 159, 163;
National Labor Relations Board v. *Waterman, S. S. Corporation*, 309 U. S. 206.

This application for a writ does not involve any factual review of evidence *all* the allegations of the petition having been admitted.

Statement of Case

The case, so far as material to the consideration of this application, is stated in the petition (pp. 2-5).

Specifications of Errors

The errors which petitioner will urge if a writ of certiorari is granted are that the Court of Appeals for the Second Circuit erred in denying the petition for the following reasons:

(1) That the determination of the true deficiency by the Treasury Department was conclusive upon the Court of Appeals and it was its duty to modify the deficiency judgment in accordance therewith.

(2) That the Court of Appeals should have granted the petition under the authority of *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, 322 U. S. 238.

ARGUMENT

POINT I

The decision of the Court of Appeals failed to accord due force and effect to the conceded factual determination of the Treasury Department modifying the tax deficiency in the sum of $5,319.89. Such decision is not in accordance with applicable decisions of this Court.

It has long been settled by this Court as a matter of general policy that the actions and determinations of public officers and governmental departments rendered in the routine course of the discharge of public duties within the scope of their authority are presumptively correct and, unless challenged for cause, are *conclusive* upon all parties, *including the courts.* This rule of law applies to tax determinations of the Treasury Department.

Milliken v. *United States,* 283 U. S. 15, 19;
Ross v. *Stewart,* 227 U. S. 530, 535;
Ross v. *Day,* 232 U. S. 110, 117;
Bates & Guild Co. v. *Payne,* 194 U. S. 106, 109;
Mullan v. *United States,* 140 U. S. 240, 245;
Wilkes v. *Dinsman,* 48 U. S. 89, 131;
Johnson v. *Towsley,* 13 Wallace 72, 83.

The same presumption of correctness established by these decisions which obtained in favor of the Commissioner's original determination of the deficiency (which, to overcome, the petitioner was obliged to challenge) obtains when the same official or department makes a corrective determination in favor of the petitioner and which, conceded and unchallenged, becomes conclusive.

Vital considerations were presented by the petitioner with respect to which the Court of Appeals apparently failed to accord proper recognition, the Court stating that they afforded "no basis whatever" to modify the erroneous

judgment. These are: (a) the opinion of the Department of Justice rendered (January, 1939) to the Treasury Department in the discharge of official duty advising that the deficiency judgment was fundamentally erroneous and that the error had been caused by the "erroneous insistence of the representatives of the Government", and that the petitioner in good conscience was entitled to relief; (b) more essential, the redetermination (October, 1944) of the deficiency by the Treasury Department, based upon recomputation, that the true deficiency was $5,319.89, and (c) the unqualified admission by the respondent—in effect the Treasury Department—that the Department of Justice had advised it as aforesaid and that the Treasury Department had found the true deficiency to be as stated.

It is submitted that these facts *presented to the Court for the first time,* constitute a proper and decisive basis for a proceeding de novo in equity for the modification of the judgment.

Hazel-Atlas (supra), and cases cited therein;
Johnson v. *Towsley,* 13 Wallace 72, 84.

POINT II

The Court of Appeals apparently held that the doctrine of Hazel-Atlas did not apply because the deficiency judgment was not obtained by "fraud". Such a conclusion is not in accordance with the decision of this Court in Hazel-Atlas.

The respondent Commissioner, in his answer, contended that Hazel-Atlas does not apply because the deficiency judgment was not obtained through fraud. With this defense the Court of Appeals apparently agreed as it held that the determination of the Treasury Department demonstrating that a gross mistake had been made constituted no basis for modification.

In Hazel-Atlas this Court directed that the judgment, obtained twelve years previously, be vacated, because it had been obtained through fraud. The Court, however, did not limit the application of the equitable rule involved to cases of fraud but clearly stated that fraud was but *"one"* of the circumstances whereunder equity would act. The opinion reads:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect *that under certain circumstances, one of which is after-discovered fraud,* relief will be granted against judgments regardless of the term of their entry." (Emphasis supplied.)

In the instant case the error is "gross", the deficiency judgment being ten times the amount of the true deficiency as subsequently determined by the Treasury Department. What stronger ground can be conceived for the exercise by the Court of its equity powers which the petitioner is invoking?

The rational purpose of the equitable rule involved is to remedy grievous errors no matter what the cause may be—fraud or otherwise. The scope of the opinion of this Court in Hazel-Atlas extends well beyond cases of fraudulently obtained judgments. The Court stated:

> "This equity rule which was firmly established in English practice long before the foundation of our Republic the Courts have developed and fashioned to fulfill a universally recognized need for correcting injustices *which in certain instances are deemed sufficiently gross* to demand a departure from rigid adherence to the term rule." (Emphasis supplied.)

The opinion also states:

> "But where the occasion has demanded, *where enforcement of the judgment is 'manifestly unconscionable'* * * * they have wielded the power without hesitation." (Emphasis supplied.)

The rule, as not being confined to fraud, is similarly stated in *Johnson* v. *Towsley* (*supra*), the Court stating:

> "On the other hand, there has always existed in courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong *in both judicial* and executive action, however solemn the form which the result of that action may assume, when it invades private rights; *and by virtue of this power the final judgments of courts of law have been annulled or modified* • • •." (Emphasis supplied.)

POINT III

The Court of Appeals, while recognizing as a matter of equity that the petitioner is entitled to relief, declined to modify its judgment. Such negation is not in accordance with the decision of this Court in Hazel-Atlas to the effect that it is the duty of the Court to grant relief where the circumstances are clear and unquestioned.

There is no question as to the error involved. The deficiency judgment, for an amount many times that of the true deficiency, was caused, in the opinion of the Department of Justice, by the "erroneous insistence of representatives of the Government" which misled the Circuit Court of Appeals. The judgment is "manifestly unconscionable" to such an extent that the Court of Appeals, while denying the petition, *suggested that the petitioner could apply to Congress for restitution.* This Court in Hazel-Atlas, in dismissing an analogous suggestion that the petitioner in that case should be relegated to the District Court, stated:

> "Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require,

argues against it. We hold, therefore, that the Circuit Court on the record here presented had both *the duty* and power to vacate its own judgment * * *." (Emphasis supplied.)

Under the circumstances, it is submitted that the Court of Appeals should have remedied the error by modifying its judgment.

CONCLUSION

It is respectfully submitted that the denial by the Court of Appeals of the petition is in conflict with the applicable decisions of this Court both with respect to the conclusive character of the determination of the true deficiency by the Treasury Department and the proper exercise of the equity power expounded in Hazel-Atlas and similar decisions.

It is also submitted that the questions involve principles of general law of public importance and gravity with respect to just and fair imposition and collection of Federal taxes—such as to render appropriate, under the rules of this Court, a review of the decision of the Court of Appeals.

May, 1952.

Respectfully submitted,

OELAND & KUHN,
Attorneys for Petitioner,

By JACKSON A. DYKMAN,
Counsel.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO DISMISS PETITION FOR REVIEW OF DECREE

John B. Dunlap, Commissioner of Internal Revenue, by Ellis N. Slack, Acting Assistant Attorney General, moves to dismiss the petition for review of the decree and decision of this Court entered on the 22d day of April, 1935, upon the following grounds:

The petitioner's application for certiorari to review the decision of this Court was denied in 1935. (*Taylor* v. *Commissioner,* 296 U. S. 594.)

In 1944 a petition to review the decision and order of this Court upon the identical grounds presently urged was made by the petitioner and was denied by this Court without opinion on December 6, 1944. Certiorari to review the action of this Court was applied for and was denied in 1945. (*Taylor* v. *Commissioner,* 324 U. S. 871.)

Section 1140 of the Internal Revenue Code * provides an

* SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final * * *

(b) *Decision Affirmed or Petition for Review Dismissed* * * *.

(2) *Petition for Certiorari Denied.* * * * Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

Section 1005, 44 Stat. 110, of prior Revenue Acts, is identical.

indicated period of time upon the occurrence of which the decision of the Board of Tax Appeals (now The Tax Court of the United States) becomes absolutely final and there is no power in the Board of Tax Appeals or in any other tribunal to modify it thereafter. It was held in *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, that this statutory provision deprived even the Supreme Court of jurisdiction over a case after its denial of certiorari became final. *A fortiori*, it follows that the jurisdiction of this Court has likewise ended. See also *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d).

Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 321 U. S. 238, relied upon by the petitioner is wholly inapplicable as it involved a "fraudulently begotten judgment".

For the foregoing reasons this Court is without jurisdiction to review the decree and the petition for review should be dismissed.

ELLIS N. SLACK,
Acting Assistant Attorney General.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WINTHROP TAYLOR,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On reading the petition of the taxpayer, Winthrop Taylor, for a rehearing, it is ordered that the petition be in all respects denied.

It is further ordered that the Per Curiam opinion heretofore filed February 27, 1952, denying the motion to recall the Court's mandate and vacate the decree be and the same hereby is amended to read as follows:

"This is a motion in which the petitioner prays this court to set aside its decision and decree of April 22, 1935 affirming a deficiency in his income tax for the year 1929 as determined by the Board of Tax Appeals, to recall its mandate issued thereon, direct vacation of the decision of the Board of Tax Appeals and to alter the determination of the amount of the deficiency tax to the sum of $5,319.89.

"This taxpayer in 1944 was denied a similar motion where the same facts were presented to the court as here in respect to purchases and sales. The only new proof offered is an intermural memorandum by someone in the Department of Justice to the Treasury Department in 1939, and a recomputation of the petitioner's income tax by the Treasury Department in 1944. This can afford no basis whatever for disregarding our decision. The taxpayer's only remedy, if any there be, lies in an Act of Congress to relieve him.

"Motion denied."

AUGUSTUS N. HAND,
HARRIE B. CHASE,
JEROME N. FRANK,
U. S. C. JJ.

Filed March 18, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 114

WINTHROP TAYLOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PREVIOUS OPINIONS AND ORDERS

The memorandum opinion of the Board of Tax Appeals in the original proceeding, dated June 15, 1934, is unreported, but may be found in 1934 P-H B.T.A. Memorandum Decisions, par. 34,310. The opinion of the court below, dated April 15, 1935, affirming the decision of the Board, is reported in 76 F. 2d 904. The order of this Court, dated October 14, 1935, denying taxpayer's petition for a writ of certiorari to review this decision of the court below, is reported in 296 U.S. 594, and

the order of this Court, dated November 11, 1935, denying taxpayer's petition for rehearing of the petition for a writ of certiorari, is reported in 296 U.S. 662.

The *per curiam* denial by the court below, dated December 26, 1944, of taxpayer's petition to review its judgment and decree of April 22, 1935, affirming the decision of the Board, was made without opinion and is not reported. The order of this Court, dated April 9, 1945, denying taxpayer's petition for a writ of certiorari to review this decision of the court below, is reported in 324 U.S. 871.

The *per curiam* opinion of the Court of Appeals below, as amended March 18, 1952, denying taxpayer's second motion to review and set aside its prior order (R. 27), is reported in 194 F. 2d 528.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1952 (R. 21), and taxpayer's petition for rehearing was denied on March 18, 1952 (R. 27). The petition for a writ of certiorari was filed on June 10, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to entertain taxpayer's second petition to review and vacate its judgment filed April 22, 1935, affirming the decision of the Board of Tax Appeals, in view of the provisions of Section 1140 of the Internal

Revenue Code and in view of the expiration of the term at which the judgment was entered.

2. Whether the court below, if it had jurisdiction, properly denied the petition for review in the exercise of its discretion.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code are printed in the Appendix, *infra*, pp. 15-17.

STATEMENT

This proceeding involves a second application by taxpayer to have the court below set aside its decision and decree of April 22, 1935, affirming a deficiency in taxpayer's income tax for the year 1929 as determined by the Board of Tax Appeals. (R. 2, 18, 27.) The deficiency for the year 1929, as affirmed by that decision, was in the amount of $51,353.70. (R. 2.) Taxpayer seeks to have the deficiency reduced to the sum of $5,319.89. (R. 18, 27.)

The deficiency relates to the treatment of a gain of $490,006.67, resulting from the sale of 14,000 shares of stock of the Public Service Corporation of New Jersey. The 14,000 shares were part of a larger quantity of 35,000 shares which taxpayer had sold. (R. 5.) In his income tax return for 1929, taxpayer reported the $490,006.67 as a capital net gain, on which he paid tax at a rate of 12½%. The Commissioner determined that that sum should be treated as ordinary income. (R. 3.)

The questions raised by the deficiency assessment and litigated before the Board of Tax Appeals and the Court of Appeals were (1) whether the 14,000 shares in question were held primarily for sale in the course of trade or business, and (2) if not, whether they were held as capital assets for more than two years. (R. 5.) The court below, in its opinion rendered on April 15, 1935 (*Taylor* v. *Commissioner,* 76 F. 2d 904), ruled against taxpayer on the second ground, and on April 22, 1935, entered judgment affirming the order of the Board of Tax Appeals dated June 15, 1934, redetermining in the sum of $51,353.70 the deficiency found by the Commissioner. On April 29, 1935, the court below denied petition for rehearing. This Court, on October 14, 1935, denied taxpayer's petition for certiorari (*Taylor* v. *Commissioner,* 296 U.S. 594), and, on November 11, 1935, denied taxpayer's petition for rehearing (296 U.S. 662). (R. 5.)

Thereafter, taxpayer applied to the Department of Justice for further review of the case. On August 8, 1939, the Department of Justice advised taxpayer that in view of the decree of the court below, affirming the order of the Board of Tax Appeals, neither the Attorney General nor the Secretary of the Treasury, nor both acting in conjunction, had any power to remit the deficiency. (R. 5-6.)

Subsequently, taxpayer alleges, he discovered, as a result of search, the original purchase and sales

tickets covering the 21,000 additional shares of Public Service stock and submitted the record of the purchases and sales covering the entire 35,000 shares sold to the Bureau of Internal Revenue in conjunction with an offer in compromise. He further alleges that on October 17, 1944, the Treasury Department, in a written report, recomputed the 1929 tax deficiency to be $5,319.89, but rejected the offer in compromise and notified taxpayer that in view of the judgment of the court below the Treasury Department had no authority to compromise a tax legally due for an amount less than could be collected. (R. 6.)

In December, 1944, taxpayer filed in the Court of Appeals below a first petition for review of its decree of April 22, 1935, praying that the court below vacate and set it aside on the basis of the record of the purchases and sales of the entire 35,000 shares, and alleging that this evidence confirmed that the 14,000 shares had been held for more than two years prior to sale. The Commissioner's answer requested dismissal of the petition on the ground that the court was without jurisdiction to review its prior decree. The court below denied taxpayer's petition without opinion on December 26, 1944. Thereafter, on April 9, 1945 (*Taylor* v. *Commissioner,* 324 U.S. 871), this Court denied taxpayer's petition for certiorari to review this decision. (R. 6.)

After the denials, taxpayer paid under protest to the Collector of Internal Revenue the entire de-

ficiency in income tax for the year 1929, including interest, as follows (R. 7):

July 17, 1945	$14,034.33
December 5, 1945	51,353.70
December 26, 1945	9,454.09
December 27, 1946	15,000.00
December 15, 1947	19,000.00

aggregating $108,842.12.

On or about July 12, 1949, taxpayer commenced

~~On January 10, 1952, taxpayer filed in the court~~ an action in the United States District Court for the Eastern District of New York against Joseph P. Marcelle, the Collector to whom he had made the tax payments, for refund of the difference between the total amount of $108,842.12 and the sum of $5,319.89. (R. 7-8.) In this action the district court granted the defendant's motion for summary judgment, based on the ground of *res judicata,* and dismissed taxpayer's complaint on February 23, 1951. (R. 9, 12-14.) Taxpayer has appealed to the court below from this decision of the district court and his appeal is now pending. (R. 9.)

On January 10, 1952, taxpayer filed in the court below the present petition for review of its decree of April 22, 1935. In this second petition, taxpayer alleges (R. 6-7) that when he filed his first petition for review in December, 1944, he was not aware of the fact that the Department of Justice, in a memorandum addressed to the Treasury Department on January 19, 1939, in connection with his application pending at that time for review of his case by the Department of Justice, had stated that

"We find the petitioner in good conscience to be entitled to relief", that the case was one "in which relief ought to be afforded", and (R. 7)—

> that it was due to the erroneous insistence of the representatives of the Government that the taxpayer had not established that he had held the stock in question for more than two years prior to sale which led the Board into making, and the Court into sustaining, a fundamental erroneous deficiency determination.

Taxpayer further alleges that he was likewise not aware at the time he filed his petition for review in the court below in 1944, that on October 17, 1944, the Treasury Department, in a written report upon the basis of the purchases and sales records of the entire 35,000 shares, made in connection with his offer of compromise, had computed the tax deficiency to be $5,319.89. (R. 7.)

In his present petition for review, taxpayer alleges that, if the decision of the district court in the refund suit is correct, he cannot obtain relief so long as that 1935 judgment of the court below stands. He invokes the decision of this Court in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, as authorizing relief here after the expiration of the term at which the judgment of the court below was entered. (R. 9-10.) He accordingly requests that the court below set aside its decision and decree of April 22, 1935, and make an order redetermining the amount of deficiency in taxpayer's income tax for the year 1929 to the sum of $5,319.89. (R. 10.)

The Commissioner moved to dismiss the petition on the ground that the court below was without jurisdiction to review its 1935 decree. (R. 19-20.) The court below denied taxpayer's petition (R. 20-21), and held moot the Commissioner's motion to dismiss (R. 22). The court below also denied taxpayer's petition for a rehearing (R. 24-26) by an order which at the same time amended its per curiam opinion, (R. 27).

In its opinion, the court below pointed out that in 1944 it denied a similar motion in which the same facts were presented to the court in respect to the purchases and sales. It said that the only new proof offered was "an intermural memorandum by someone in the Department of Justice to the Treasury Department in 1939, and a recomputation of the petitioner's income tax by the Treasury Department in 1944." This proof, the court below concluded, could afford no basis for disregarding its earlier decision. (R. 27.)

ARGUMENT

1. By decisions of this Court and numerous decisions of the courts of appeals it is well settled that pursuant to Section 1140 of the Internal Revenue Code (Appendix, *infra,* pp. 15-17), decisions of the Board become "final" at the times specified, without the qualifications which may exist in regard to ordinary judgments. The section was originally adopted as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Its purpose and effect are expressed in the committee report which recom-

mended its adoption (S. Rep. No. 52, 69th Cong., 1st Sess., pp. 37-38 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

The explicit requirement of the statute deprives the court of its jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment even during the term at which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Similarly, we believe, the court below was without jurisdiction to review for any reason its own order and the decision of the Board, more than sixteen years after denial by this Court of a petition for certiorari (October 14, 1935, 296 U.S. 594) and of

a petition for rehearing on the petition for certiorari (November 11, 1935, 296 U.S. 662), which the statute specifies as an action that renders the decision of the Board final. Internal Revenue Code, Section 1140 (b)(2) (Appendix, *infra*, p. 15); *R. Simpson & Co.* v. *Commissioner, supra.* In *Sweet* v. *Commissioner,* 120 F. 2d 77, 81 (C.A. 1st), the court said:

> From a reading of § 1005 [of the Revenue Act of 1926, identical with Section 1140 of the Internal Revenue Code] as a whole it is apparent that the old chancery practice with reference to bills of review has no place in the statutory scheme regulating the procedure for adjudicating tax disputes instituted before the Board of Tax Appeals.

To the same effect are *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716, 726, 727; *Crews* v. *Commissioner,* 120 F. 2d 749 (C.A. 10th), certiorari denied, 314 U.S. 664; *Swall* v. *Commissioner,* 122 F. 2d 324 (C.A. 9th); *McCarthy* v. *Commissioner,* 139 F. 2d 20 (C.A. 7th); *Monjar* v. *Commissioner,* 140 F. 2d 263 (C.A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746 (C.A. 3d); see also *Merrill* v. *United States,* 152 F. 2d 74 (C.A. 2d).

For this reason, *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238, upon which taxpayer relies (R. 9; Pet. 2; Br. 12-14), does not apply. In that case there was no statute limiting jurisdiction to review. Here, Congress has chosen to fix irrevocably the termination of tax controversies at the times spe-

cifically prescribed. These statutory limits may not be disregarded upon petition for review.

In *Rothensies* v. *Electric Battery Co.*, 329 U. S. 296, this Court observed (pp. 301, 302, 303)—

> a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.
>
> * * * * *
>
> As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out.
>
> * * * * *
>
> If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them.

See *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C.A. 1).

2. Even apart from the statute, the court below, upon well-settled principles, was without power to entertain this second petition for review of its 1935 judgment. Unlike *Hazel-Atlas Co.* v. *Hartford Co., supra*, p. 244, this is not a case of "after-discovered fraud", or anything comparable thereto. The asserted errors consist in the court's decision that the stock involved had not been held for two years. The most that can be said is that taxpayer has subsequently submitted evidence, which was at all times available to him, which if submitted at

the original proceeding might have led to the opposite conclusion. Whether or not that evidence was of a character which would, in an ordinary civil proceeding, have supported a motion for new trial on the ground of newly discovered evidence filed within one year after the judgment (Rule 60(b)(2), F.R.C.P.), it certainly would not, under the usual rules, support a bill of review 16 years later.

The questions on which petitioner asserts error were fully litigated in the original proceedings as shown by the opinion of the Court of Appeals (*Taylor* v. *Commissioner, supra,* 76 F. 2d 904), and as noted by Judge Kennedy in his opinion in *Taylor* v. *Marcelle,* 97 F. Supp. 35 (E.D.N.Y.) (R. 12-14). The same errors here alleged were urged before the Board, in the argument to the Court of Appeals, in the petition to that court for rehearing and in the petitions for certiorari and for rehearing filed in this Court in 1935. Moreover, the *Hazel-Atlas Co.* case was invoked by taxpayer in his first petition for review in 1944, which presented the same facts as are presented here in respect to purchases and sales. Taxpayer's petition for certiorari to review that order of the court below, which relied primarily upon the *Hazel-Atlas Co.* case, was denied by this Court in 1945. (324 U. S. 871.) The only new proof now offered is an intermural memorandum of January, 1939, by someone in the Department of Justice to the Treasury Department, and a recomputation of taxpayer's income tax by the Treasury Department in 1944. (R. 6-7.) But taxpayer also states that he was informed by the

Department of Justice on August 8, 1939, that in view of the decree of the court below no power existed in the Attorney General or the Secretary of the Treasury to grant remission of the deficiency. (R. 5-6.) In any event, nothing in *Hazel-Atlas Co.* v. *Hartford Co., supra,* holds that many years after a judgment has become final the court has power to review matters which were in issue and were fully disposed of by the judgment, merely on the ground that they were incorrectly decided, or that the losing party had failed to present evidence which might have produced a different decision. If such a power existed, litigation would never end. No such power exists. *United States* v. *Throckmorton,* 98 U. S. 61, 65-69; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 423-424.

3. Even if the court below were deemed to have power to grant the review sought, it committed no abuse of discretion in denying the petition. Incalculable confusion would result from the reopening of old tax cases merely because it was asserted that questions had been decided incorrectly many years before, when no claim of corruption or fraud is involved. *Rothensies* v. *Electric Battery Co., supra.* Especially is this true on a record such as here, where more than seven years ago a previous petition for review based on substantially the same grounds was considered and denied by the court below and certiorari denied by this Court.

CONCLUSION

The decision below is clearly correct, and there is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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JULY 1952.

Internal Revenue Code:

SEC. 1140. Date when Board decision becomes final.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the petition for the Board has been affirmed or the decision of the Board has been affirmed or the review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—If

(1) *Upon mandate of Supreme Court.*—the decision of the Supreme Court directs that the

the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing; and if (1) the time allowed for filing a petition for certiorari has expired, and

no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) *Definitions.*—As used in this section—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.* — The term "mandate", in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(26 U.S.C., 1946 ed., Sec. 1140.)

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OCTOBER TERM 1952

No. 114

WINTHROP TAYLOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This reply refers to respondent's argument in Points 1, 2 and 3 of his brief (pp. 8-13) in opposition.

(1) Respondent's principal argument that the writ should not be granted is based upon the jurisdictional question raised under Section 1140 of the Internal Revenue Code. The Court of Appeals did not pass upon the contention of limitation raised by the respondent in his motion to dismiss (R. 19). The decision of the Court of Appeals denying the petition to modify the judgment was based upon its denial of the petition of 1944, the Court holding that the new matter presented for the first time and admitted by the respondent, consisting of the determination of the true deficiency by the Treasury Department and the opinion of the Department of Justice, afforded no ground for modifying the judgment. Since the Court of Appeals did not pass upon the jurisdictional question based upon the contention of limitation, the petition for certiorari did

not present to this Court such question as a reason for granting the writ. It would appear that such issue need not be decided to dispose of the case as no precedent has been created (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 387). It would also appear that the question is one of first impression not passed upon by the Court of Appeals and might not, therefore, be considered by this Court (*Graham* v. *Brotherhood of L. F. & E.*, 338 U. S. 232, 237).

If, however, this Court considers the question of limitation raised by the respondent, the petitioner submits that such an issue presents additional ground for granting certiorari since it involves an important issue of public law not heretofore decided under the unique factual circumstances of this case and which also may involve a conflict.

In the Court below the respondent raised the question of limitation under Section 1140 of the Internal Code as fixing a time when the decision of the Tax Board became final and in support cited *R. Simpson & Company* v. *Commissioner*, 321 U. S. 225; and *Monjar* v. *Commissioner*, 140 F. 2d, 263 (C. A. 2d) (pp. 19-20). In answer to this defense petitioner stated, in part, to the Court of Appeals:

> The Simpson case upon which respondent relies was a certiorari to review the affirmance of a decision of the Board as distinguished from an independent, original proceeding in this Court to obtain a review of its own decision upon extraordinary, equitable grounds. It involved a consideration of the merits of the tax case itself within the frame-work of that case.
>
> Petitioner here is not attempting to reargue the decision of the Board upon the record before it or asking a rehearing in the tax case. Petitioner is seeking relief in this Court in an original proceeding in equity upon facts never before presented and unknown to him when he sought relief before.
>
> It was definitely held in the Hazel-Atlas case, supra, that with respect to such a proceeding there is no time limitation. It is incidental that the judgment sought now to be modified, on the basis of subsequent recogni-

tion and concession of facts existing but not disclosed when it was rendered, involves a tax deficiency which has been fully paid. As the Hazel-Atlas case points out, generally speaking all judgments rendered by the District Courts and affirmed on appeal are unassailable after the lapse of time under the 'term rule' but this limitation does not apply to original proceedings known as bills for review invoking the equitable powers of this Court which under 'certain circumstances' will be exercised regardless of normal time limitations (Brief, p. 13).

Respondent also cites (Brief, p. 10) cases in support of the contention that the petitioner is barred by limitation pursuant to Section 1140 of the Internal Revenue Code (formerly Section 1005 of the Revenue Act of 1926). None of these cases, however, involves a situation similar to that disclosed by the record in the present case. They involve applications to the Board of Tax Appeals to open up or otherwise review adjudicated tax cases upon grounds having to do with controversial questions of law or other technical issues claimed to have been erroneously decided. None involves the invocation of independent traditional equity powers to correct judgments "manifestly unconscionable" and *admittedly* factually erroneous based upon a petition directed to the United States Court of Appeals instead of the Tax Board. Nor do they present admissions by the taxing authority that the judgment is factually erroneous and that the error was caused by the erroneous insistence of representatives of the Government.

In the case of *Sweet* v. *Commissioner,* 120 F. 2d 77, 81, cited and quoted by the respondent, while it is stated in the opinion that the ancient and still existing chancery practice has no place in the "statutory scheme" of adjudicating tax disputes before the Board of Tax Appeals, it does not follow that the Court of Appeals has been stripped of traditional equity powers to correct and modify its judgments under the principles of Hazel-Atlas. The *Sweet* case was a petition for leave to present to the Board of Tax Appeals

a motion to review an order redetermining a deficiency. The basis of the application was a subsequent decision in conflict with the interpretation of the statute, made by the Circuit Court of Appeals on review of the board's decision (p. 78). This was in no sense an invocation of the ancient equity practice involved in the present case.

Incidentally, the opinion in the *Sweet* case, in referring, at page 81, to *Buttenbach* v. *Commissioner*, 63 F. 2d, 630, which allowed the opening of a tax case by the Tax Board after the date of finality, implied that that case might have been properly decided "upon the peculiar circumstances" involved, there having existed no real controversy between the taxpayer and the Government.

In *Monjar* v. *Commissioner of Internal Revenue*, 140 F. 2d 263-265, cited by the respondent, the court found it necessary to distinguish *Buttenbach* v. *Commissioner*, 63 F. 2d 630, upon the ground of "extraordinary circumstances" arising out of a stipulation between the taxpayer and the Commissioner, stating that in the instant case there was no such agreement. Here, the Treasury Department, of which this respondent is the agent, has determined the proper deficiency.

Petitioner is not concerned with the disposal of applications to Tax Board made within the frame-work of the original tax proceedings. Our contention is that there is no statutory limitation to an original equity proceeding to correct judgments even in tax cases where the extent and extraordinary character of the error and the circumstances under which it was made are admitted.

Respondent, at page 11 of his brief, cites and quotes from *Rothensies* v. *Electric Battery Co.*, 293 U. S. 296. In this case the Court explains the rational basis for limitation in tax cases a basis, however, which does not exist under the circumstances here presented. In the present case there is nothing to be relitigated and no necessity "to produce vouchers, prove events, establish valuations and recall details of all that goes into an income tax contest." Nor does the case involve a revival of a case "allowed to

slumber until evidence has been lost, memories have faded and witnesses have disappeared". The Treasury Department itself has conferred finality in a true and factual sense by its determination of the correct deficiency and there is nothing left except to refund the excess collected because of the admitted fundamental error.

In order to obtain justice and equity petitioner is asking that the judgment be modified in conformity with the determination of the Treasury Department.

Respondent also cites, at page 11 of his brief, the case of *Denholm & McKay* v. *Commissioner*, 132 F. 2d 243. With respect to the meaning or reason for the statutory limitation urged by respondent it is of interest to note that the Court stated:

> "It was the evident purpose of the Congress in prescribing so minutely the dates on which the Board decisions became final in the various situations, *to enable the Commissioner to know exactly when he is at liberty to make the deficiency assessment*, upon the basis of which the Collector proceeds to collect the tax, in cases where the Board has found a deficiency. See Int. Rev. Code, Section 272 b) and (8), 26 U. S. C. A. Int. Rev. Code, Section 272 b, h" (p. 248). (Emphasis supplied.)

The foregoing judicial interpretation of the reason for the enactment of Section 1140 is confirmed by the quotation of the Congressional Committee report referred to by the respondent in his brief (pp. 8-9) as expressing the "purpose and effect" of the enactment. The report states in part:

> *"Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during the review of the Commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible."* (Emphasis supplied.)

In the light of the foregoing, Section 1140 has no application with respect to limiting *the time of the petitioner* to modify in an equity proceeding the erroneous judgment. Moreover, no attempt is involved to arrest or delay collection—the tax has long ago been paid in full and the present application is merely to correct by modification the amount of the deficiency judgment.

(2) Under Point 2 of his brief respondent contends that Hazel-Atlas is limited to "after-discovered fraud" and therefore does not apply to the present case with respect to which the respondent states:

> "The asserted errors consist in the Court's decision that the stock involved had not been held for two years. The most that can be said is that the taxpayer has subsequently submitted evidence which was at all times available to him which if submitted at the original proceeding might have led to the opposite conclusion" (Brief, p. 11).

The above quotation does not correctly state the petitioner's position. The petitioner is not relying upon any argument that the stock involved had been held for two years or upon subsequently submitted evidence with respect thereto. The petitioner is relying upon the official determination of the true deficiency by the Treasury Department—the Government itself—which incontrovertibly has established the fundamental error and which the respondent has admitted. Supplementing this admission the petition has also pleaded the opinion of the Department of Justice, which the respondent also admits, stating the reason why the error was made, i.e., "The erroneous insistence of representatives of the Government". Under these factual circumstances it is submitted that the decision of Hazel-Atlas and similar decisions upholding long-established equity powers to correct fundamentally erroneous judgments are not limited in principle to cases of fraud. The lapse of time is incidental. In Hazel-Atlas twelve years intervened before justice was finally achieved.

(3) Under this point respondent's brief st f states:

> "*Incalculable confusion* would result f*was asserted* that of old tax cases *merely because it was* y many years be- questions had been decided incorrectly n raud is involved." fore when no claim of corruption or frau (Brief, p. 13, emphasis supplied.)

The respondent again incorrectly states the he petitioner's po- sition. A rehearing of the case is not involve olved and relief is not asked because of mere assertions that at questions had been incorrectly decided. Nor is any prejudi judice involved to any party or intervening interests. The m e modification of the judgment, achieving simple justice by a r a refund, instead of confusing will harmonize with the admin ministrative find- ings of the appropriate government agency cy computing the correct amount which should have been coll collected.

CONCLUSION

It is respectfully submitted that certiora iorari should be granted.

July, 1952.

Respectfully submitted,

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